



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Announcement of Non-material Change to the Farm Labor Survey Used for Determining the Adverse Effect Wage Rate

AGENCY: Employment and Training Administration, Department of Labor

ACTION: Announcement of non-material change .

SUMMARY: Under the Department of Labor's (we or the Department) H-2A temporary labor certification program, Adverse Effect Wage Rates (AEWRs) are the minimum wage rates the Department has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment for a particular occupation and area such that the wages of similarly employed United States (U.S.) workers will not be adversely affected. 20 CFR 655.100(b). AEWRs are derived from the Farm Labor Survey (FLS) issued by the U.S. Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS). In the interest of government transparency, we are publishing this document to announce a non-material change in the frequency of establishment surveys under the FLS (and its accompanying publication) beginning in 2012.

DATES: This announcement is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D.,
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Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY calling the toll-free Federal Information Relay Service as 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

The U.S. Citizenship and Immigration Services of the Department of Homeland Security will not approve an employer's petition for the admission of H-2A nonimmigrant temporary agricultural workers in the U.S. unless the petitioner has received from the Department an H-2A labor certification. The labor certification provides that: (1) there are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5).

The Department's H-2A regulations at 20 CFR 655.120(a) provide that employers must pay their H-2A workers and workers in corresponding employment at least the highest of: (i) the AEWR; (ii) the prevailing wage; (iii) the prevailing piece rate; (iv) the agreed-upon collective bargaining wage, if applicable; or (v) the Federal or State minimum wage, in effect at the time the work is performed. The H-2A regulations define the AEWR as "[t]he annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S.

Department of Agriculture (USDA) based upon its quarterly wage survey.” 20 CFR 655.103(a) and (b).

NASS historically has conducted the FLS on which the AEW is based. The FLS provides quarterly statistics on the number of agricultural workers; hours worked, and wage rates. We have relied upon the FLS since 1987¹ as the basis for setting the AEW. We explain our reasons in great detail in the preamble of the “Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule”, 75 FR 6884, 6891-6901, Feb. 12, 2010 (the 2010 H-2A Rule). However, we are publishing several clarifications in light of recent changes to the method by which the FLS is conducted.

We stated in the preamble to the 2010 H-2A Final Rule that “

[t]he FLS is conducted each year in January, April, July and October, and results are published the following month.

We also stated in the preamble that:

The FLS and publication schedule provide timely data for purposes of calculating the relevant State AEWs. Specifically, the FLS is routinely available and published within 1 month of the survey date. The quarterly gathering of data ensures that the annual averages are more accurately reflective of the fluctuations of farm labor patterns, which are by definition seasonal and thus more subject to fluctuation than other occupations. .

However, beginning calendar year 2012, NASS will conduct the FLS semi-annually and collect data for January and April during April and collect data for July and October during October. In other words, NASS will continue to collect data from all four quarters but will only survey the establishments twice a year, with publication of the results the following month. Other than this change in frequency in which establishments are

¹ There a brief period of deviation beginning January 17, 2009 through March 14, 2010, where we decided to use the Bureau of Labor Statistics Occupational Employment Statistics Survey rather than the FLS to set the AEW. See “Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, Final Rule”, 73 FR 77110, Dec. 18, 2008.

surveyed, and the accompanying publication of the results, the FLS remains the same as described in the preamble to the 2010 H-2A Rule. NASS will continue to include its annual average estimate for wage rates, based on data collected from all four quarters of the year, in the October FLS report which is published in November.

The change in how frequently establishments are surveyed (and the accompanying publication of those results) does not change the statistical validity of the FLS. In the fall of 2011, NASS conducted an internal review and found that there was not enough evidence to conclude that collecting quarterly data at 3 months after the estimation period resulted in a statistically significant recall bias. Accordingly, the definition of AEWR at 20 CFR 655.103(b)² and the justification for returning to the FLS as the basis for the AEWR continue to apply and are not materially affected by this procedural change.

Signed in Washington, D.C. this 28th day of February, 2012.

Jane Oates

Assistant Secretary,
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Billing Code: 4510-FP-P

² Although the definition of AEWR refers to “quarterly surveys,” we do not believe that it is necessary to replace that reference with “semi-annual surveys,” as the NASS will continue to collect wage data from all four quarters and the annual weighted average hourly wage for field and livestock workers (combined) in the States or regions would continue to be based upon that quarterly wage data.

